No. 80-626

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1980

CALVIN ANDRE GRAVETT,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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QUESTIONS PRESENTED

1. Where the constitutional question raised by a motion to dismiss with respect to the enforcement of a penal statute is asserted as a bar to prosecution, independent of evidentiary consideration reaching guilt or innocence, may a trial court, consistent with due process of law, and equal protection of law, grant a motion to dismiss on proffered testimony and testimony before proceeding to trial on a case, where the motion to dismiss alleges in effect, a "defect in the institution of the prosecution" and an unconstitutional application of the statute in violation of constitutional rights guaranteed under the First, Fourth, Fifth and Fourteenth Amendments?

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OPINIONS BELOW

Petitioner was arrested in September of 1979 on a statement of charges and brought to trial in the Circuit Court for Prince George's County on the charge of "distributing obscene matter in violation of Maryland Code, Article 27, Section 418." He contended, in a motion to dismiss, that there was a "defect in the institution of his prosecution", under the facts and circumstances in his case by virtue of Article 27, Section 423 in addition to other constitutional violations. The trial court granted petitioner's motion to dismiss the case and the State took an appeal to the Court of Special Appeals of Maryland on

November 27, 1979. The Maryland Court of Special Appeals on May 12, 1980 reversed the trial court in an unreported opinion which is attached hereto as Appendix A. The Maryland Court of Special Appeals reasoned that the trial court could not grant a motion to dismiss alleging an unconstitutional application of a statute on "proffered testimony."

A petition for a writ of certiorari was timely filed by petitioner herein to the Maryland Court of Appeals on June 18, 1980. The Maryland Court of Appeals, by written order, denied the petition for a writ of certiorari on August 11, 1980. The order of denial is not reported and without opinion and is set out as Appendix B.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on August 11, 1980 and the judgment was thus final. The jurisdiction of this Court is invoked under Title 18, U.S.C.A §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and the provisions of Maryland Code, Article 27, §§418, 423; Maryland Rule 736(a)(c)(f) are set forth in Appendix C hereto.

STATEMENT OF THE CASE

Petitioner is an employee of a bookstore that makes available to the adult public, magazines and film that depict or described sexual conduct, which is presumptively protected expression under the First Amendment to the United States

Constitution. Throughout the store where petitioner is employed, there appeared signs stating the following:

> "The material sold in this store is sold only for scientific, educational, governmental or other similar justification."

At the cash register, where petitioner was seated, there appeared a sign stating the following:

> "The customer agrees that the material selected by him or her is being purchased by him or her for scientific, educational, governmental or other similar justification."

Article 27, Section 423 of the Annotated Code of Maryland allows the possession of *obscene* material for scientific, educational, governmental or other similar justification and distribution pursuant to such justification.

On November 17, 1978, a police officer entered the store where petitioner was employed and selected a film that was in a box. He went to the cash register where petitioner was seated and paid for the film. He did not have an opportunity to view the film until he left the store and returned to the police station. He then obtained an arrest warrant for petitioner for "distributing obscene matter in violation of Article 27, Section 418 of the Maryland Code."

Petitioner was brought to trial in September of 1979 and in his motion to dismiss, he objected to his prosecution and arrest, alleging that the Maryland statute was unconstitutionally applied to him under the facts and circumstances existing at the time of arrest. As a result thereof, he argued that the statute was being unconstitutionally applied to him in light of the State's knowledge of Article 27, Section 423, and other facts known to

the State at the time of his arrest and that his rights under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution were being violated.

In support of the motion to dismiss, the petitioner proffered the fact that the officer purchased the film for governmental purposes and asked the court to take judicial notice of Article 27, Section 423. The petitioner also proffered that the State was charged with knowledge of Article 27. Section 423 at the time the petitioner was arrested, and the statement of charges was issued, and that under the totality of the facts and circumstances the State was aware of at the time of the petitioner's arrest, this was an unconstitutional application of the statute and a violation of his rights under the First, Fourth, Fifth and Fourteenth Amendments and the motion to dismiss should be granted.

The prosecution argued that just because the defense will argue boilerplate signs posted over the adult bookstore at wh ch the petitioner works, that doesn't make it a bona fide claim that the films are being sold for a bona fide scientific, educational or governmental literary purpose (33a).

At the conclusion of the argument by petitioner's counsel and the prosecution, the court requested testimony in connection with the *exemption portion* of the statute (37a).

Petitioner advised the court that the testimony in connection with the motion to dismiss and motion to suppress would be overlapping and since there was a motion to suppress before the court and a request for a suppression hearing, *the testimony requested by the court would be produced in the suppression hearing.*

Petitioner thereafter produced testimony from the purchasing police officer that he purchased the film with advanced funds of the police department (41a) and that he purchased the film *for use in his employment as a police officer* (42a).

At the conclusion of the evidence, petitioner argued that the purchase by the police officer was for *governmental justification* and that pursuant to Article 27, Section 423, the statute was being unconstitutionally applied to petitioner in violation of his rights under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution under the facts and circumstances in this case.

The trial court took under advisement, the motions to dismiss and suppress, which raised the constitutional questions hereinabove referred to and granted the motion to dismiss stating as follows:

> "The Court is of the opinion that the provisions of Article 27, Section 423, extend an outright exemption in this case, noting in passing that the alleged obscene material was obtained by Corporal Fickinger, a government agent, and the Court rules that if the government had a right to possess, someone had a right to deliver the possession, and accordingly will grant the motion to dismiss. This action by the Court leaves the State free to proceed with any appeal at review that they wish.
>
> The question of the overbreadth or the vagueness of the section, Section 423, relative to the constitutional question will not have to be decided by this Court. Although I might observe in passing it would appear to this Court to be vague and overreaching. However, the decision in this case is predicated upon the fact that the Court at this hearing declares that the defendant is exempt in an evaluation of the testimony proffered with respect to the motion to dismiss and, accordingly, will dismiss the information."

Timely appeal was taken by respondents and the trial court was reversed on May 12, 1980 by the Court of Special Appeals of Maryland. A timely petition for writ of certiorari was filed by petitioner to the Maryland Court of Appeals and denied on August 11, 1980.

HOW THE FEDERAL QUESTIONS WERE RAISED

The question of the unconstitutional application of Article 27, Section 418 to the petitioner under the facts and circumstances known to the prosecution at the time of his arrest, was raised by a motion to dismiss and oral argument, which was heard by the circuit court judge before a trial on the merits. This motion is printed in the appendix, *infra,* 14a-20a). The oral argument alleging an unconstitutional application of the statute appears at 26a, 31a of the appendix. The motion to dismiss was granted by the trial court (56a). Excerpts from the transcript of petitioner's trial, which embody the ruling of the Circuit Court of Prince George's County upon the motion to dismiss are printed in the appendix, *infra,* 56a. The State took an appeal to the Court of Special Appeals of Maryland and petitioner thereafter re-raised the issue of the unconstitutional application of the statute. The "Statement of the Questions Presented" contained in petitioner's brief before the Maryland Court of Special Appeals is printed in the appendix, *infra,* 58a. The question was again raised in the Court of Appeals of Maryland by way of a petition for a writ of certiorari and the questions presented are printed in the appendix, *infra,* 60a. The rejection of petitioner's petition for a writ of certiorari is shown by the order of the Court of Appeals of Maryland and is contained in the appendix hereto at 9a.

REASONS FOR GRANTING THE WRIT

I.

The Maryland Court of Special Appeals reversed and improperly decided the essential issue in the trial court's dismissal below and evaded the constitutional issue, which is of critical importance to the guarantee of due process of law and equal protection of the law guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution.

The Maryland Court of Special Appeals overlooked the essential basis on which the trial court dismissed the statement of charges to wit:

"Article 27, Section 423, extended an outright exemption and that if the government had a right to possess, someone had a right to deliver the possession, and therefore the statement of charges should be dismissed." The Maryland Court of Special Appeals in effect refused to deal with the federal question as to the unconstitutional application of the statute, and its refusal to deal with that question is a mere evasion. This Court has the power to examine into the raising of the federal question, and if it is convinced that the Maryland Court of Special Appeals' refusal to deal with that question is a mere evasion, this Court's jurisdiction can be asserted. *See Rodgers v. Alabama,* 92 U.S. 226.

The trial court, considering petitioner's argument as to the unconstitutional application of the statute in violation of his constitutional rights to due process and equal protection of the laws in light of the exemption provided under Article 27, Section 423 of the Maryland Code, decided that constitutional issue on the basis of argument and a police officer's testimony, *i.e.,* that he purchased an obscene film for use in his employment as a police officer with advanced funds from the police department

41a-42a). The trial court construed this evidence to mean the material was purchased for *governmental* justification and concluded that if the government had the right to possess, someone had the right to deliver possession, pursuant to Article 27, Section 423. Accepting the argument that the State was charged with knowledge of Article 27, Section 423 at the time of the purchase and the arrest; the trial court concluded that there was an unconstitutional application of the statute and dismissed the case. The trial court commented on the federal question as to the vagueness and overbreadth of the statute, which was raised in the written motion to dismiss, but found it unnecessary to decide that constitutional issue in light of its decision on the unconstitutional application issue.

The opinion of the Maryland Court of Special Appeals did not deal with the issue of the unconstitutional application of the statute in light of Article 27, Section 423, but instead stated that the trial court specifically declined to rule upon the constitutionality of the statute facially. The court, in its opinion, eluded to the fact that *the trial court addressed itself only to the statute's application to the facts in this case.* It is respectfully suggested that this is what the trial court had to do in an effort to determine if there was an unconstitutional application of the statute. This analysis was obviously used to evade the federal question of unconstitutional application of the statute, which was in fact decided by the trial court and evaded by the Maryland Court of Special Appeals in its reversal of the trial court because, in its opinion, it asserts that a motion to dismiss may not properly be grounded in proffered testimony. By virtue of this analysis, it is obvious that the Court of Special Appeals overlooked the essential basis on which the trial court dismissed the charges, for it was not based on proffered testimony, but to the contrary, was based on the police officer's testimony that he purchased the film for use in his employment as a police officer (42a), which obviously was in the opinion of the trial court sufficient to bring the case within the exemption of Article 27, Section 423.

The opinion is replete with diversions as to signs posted in the bookstore; testimony only as to the suppression motion and not as to the motion to dismiss; and insufficient testimony to establish facts which petitioner originally proffered as to the basis of his Section 423 exemption, *i.e.,* that the notices in question were posted in plain view, that the officer saw them, and that by purchasing the film he agreed to do so for governmental purposes. It becomes obvious from a complete review of the opinion by the Court of Special Appeals that the court has gone to great lengths to avoid the constitutional issue decided by the trial court and raised on appeal by diverting to everything but the plain and simple facts upon which the trial court based its decision that the statute was unconstitutionally applied, which are as follows:

1. Petitioner's counsel proffered he could demonstrate the material was purchased for governmental justification (29a).

2. The trial court took judicial notice that Article 27, Section 423 provides that the prohibitions and penalties provided under Section 418 are not applicable when the material is purchased for *governmental justification.*

3. The State was charged with knowledge of Section 423 at the time of the purchase.

4. The police officer testified that he purchased the film for use in his *employment as a police officer* (42a) and he is an arm of the government.

5. Petitioner's counsel informed the court that testimony as to the motion to dismiss and suppress would be overlapping (26a).

6. *The Court requested testimony or evidence as to the exemption portion of the statute* (37a).

7. The Court did not consider whether the signs throughout the store were seen by the police officer in reaching its decision or even consider the signs at all (56a).

8. The presence of the signs were introduced into the case by the State (33a).

9. The State on cross-examination never asked the officer if he saw the signs, or were they posted in plain view (43a-46a).

10. The implication from the State, introducing the issue of the signs into the case (33a), implies that they knew they were there and posted in plain view.

The Court of Special Appeals did not indicate that the trial court abused its discretion in granting the motion to dismiss, it simply states that the court's error *was procedural;* yet it avoids relating to the simple facts and testimony upon which the trial court based its decision and discusses everything that is inapplicable in an effort to avoid the constitutional issue as to the unconstitutional application of the statute. The opinion is no more than six pages of circumlocution.

CONCLUSION

If the decisions of this Court and the Fifth and Fourteenth Amendments to the United States Constitution, relating to due process of law, procedural or otherwise, in addition to equal protection of the laws, are to continue to have meaning and vitality, the decision of the Court of Special Appeals that is barren of case law or statutory authority to support its position, must be set aside, for its results stifle a trial court in its duty to comply with the Maryland Rules of Procedure 736(a)(c) and (f) and its ability to give due process and equal protection of the law, as a result of which, petitioner cannot receive due process and equal protection of the laws.

For the reasons set forth above, a writ of certiorari should be granted to review the judgment of the Court of Special Appeals of Maryland.

Respectfully submitted,

s/ Burton W. Sandler
Attorney for Petitioner

APPENDIX

APPENDIX A — OPINION OF MARYLAND COURT OF SPECIAL APPEALS

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 1193

September Term, 1979

STATE OF MARYLAND

V.

CALVIN ANDRE GRAVETT

Morton
Moylan
MacDaniel,
JJ.

Per Curiam

Filed: May 12, 1980

In September 1979, appellee Calvin Andre Gravett was brought to trial in the Circuit Court for Prince George's County upon a criminal information charging him with distributing obscene matter in violation of Md. Ann. Code art. 27, §418. He challenged the sufficiency of the charging document in motions to dismiss and to suppress evidence. On September 25, 1979, after a hearing on the motion to suppress, which included presentation of testimony, the trial court granted appellee's

motion to dismiss on the ground that the provisions of the statute in question granted an outright exemption to appellee under the circumstances of the case. That is to say, the trial judge ruled that appellee had committed no crime. The State has filed a timely appeal alleging error to the trial judge's dismissal of the criminal information. We shall reverse.

Article 27, §418 of the Annotated Code of Maryland provides:

> "Any person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

But §423 (Exemption) states:

> "The prohibitions and penalties imposed in this subtitle shall not extend to persons having bona fide scientific, educational, governmental, or other similar justification for possessing such matter, or to distributions thereof pursuant to such justification."

The accusations against appellee were contained in a criminal information[1] alleging that on or about November 17,

1. The accusations against appellee were originally contained in a statement of charges. At the hearing on appellee's motions to suppress and to dismiss, by agreement of both parties and with consent of the court, the statement of charges was *nolle prossed* and a criminal information filed in its place. Appellee's pleadings were then amended by interlineation to conform to the change.

1978, appellee "unlawfully did knowingly distribute obscene matter, to wit: a color film entitled 'Plenty To Go Around,'" in violation of Article 27, §418. Appellee filed motions to suppress evidence and to dismiss, which came on for hearing on May 14, 1979. Though appellee raised several issues in his motions,[2] his arguments at the hearing were confined to the sole question of the legal sufficiency of the allegations contained in the charging document. Pointing to the language of Article 27, §423, appellee argued:

> ". . . I'm saying that in our particular situation, under the Maryland statute we do not have a defense, we do not have to point out the defense. I am saying under the context of the conduct that's been alleged on the part of the defense in this case we have an outright exemption. His conduct is not criminal by the very language of the statute. In this case he allegedly sold a motion picture film that was obscene. . . . What we are saying, assuming for the sake of argument that the motion picture is obscene as a matter of law, and for the sake of argument the defendant did, in fact, sell it or distribute it, distribute it as required under the law, then, your Honor, it would not be criminal conduct under Section 423, because the object of the individual purchasing the film, we submit to the Court respectfully, we proffer to the Court that we can demonstrate, was for the purpose to be used as evidence in a pending criminal prosecution.

2. Appellee asserted that the criminal information was vague and insufficient; that his arrest was made without probable cause; that Art. 27, §418 was void for vagueness and overbreadth, and that Art. 27, §418 violated appellee's due process rights and other rights guaranteed by the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution.

Now, we would suggest, your Honor, that the officer who purchased the motion picture film and, in fact, selected the film without any help from the defendant, did so as an arm of the government, did so for governmental purposes or for other similar justification, and that is the broad language in that section of 423.

If that is what he did, then obviously the distribution was pursuant to that justification. He didn't make any other justification known to the defendant. We are suggesting, your Honor, proffering that the purpose of the distribution was also for education or other similar justification and that it's not prohibited conduct under this statute."

And, citing the Supreme Court's opinion in *Miller v. California,* 413 U.S. 15 (1973), appellee continued:

"What I am suggesting to your Honor and what we have suggested in our motion to dismiss — and this, your Honor, falls in line, I believe, with our argument in connection with the exemption under Section 423. We first take the position that we have an outright exemption, not an affirmative defense, by the very language of the statute, the very broad language of the statute under the context of the conduct that has been placed before the Court.

THE COURT: In other words, the sale wasn't solicited or thrust upon him? That's what you are saying?

MR. SANDLER [Appellee's Attorney]: Yes, sir. We are saying that under the very language of our statute we have an outright exemption.

B, we are going on further to say that because the State of Maryland must now, in trying an obscenity case, apply the Miller standards, that those standards are only applicable to a situation where material is thrust by aggressive sales action upon unwilling recipients.

THE COURT: How can I buy your first argument unless I have heard some testimony relative thereto?

MR. SANDLER: You mean the exemption portion?

THE COURT: Yes.

MR. SANDLER: As I said, your Honor, we would argue and if you wanted to hear evidence on the suppression hearing we would be more than happy to call a witness.

THE COURT: I don't feel I could make an intelligent decision on that point without evidence. I mean, what you are telling me may very well be a perusal of the evidence, but it's not literally before me.

MR. SANDLER: Then, your Honor, going on to the suppression argument and setting aside

> the motion to dismiss for a moment, we will call for the purposes of the suppression hearing the police officer to the witness stand as our witness."

Thereupon, the arresting officer was called to testify. The detective stated that shortly after eleven a.m., November 17, 1978, he entered the Silver News Store in Prince George's County and asked appellee, the attendant, if "they had any film." Appellee "brought out a stack of approximately twenty-five to thirty films and I chose my film from these, paid him [appellee] for it." The film, "Plenty To Go Around," was purchased for $15.75, tax included, with police funds. The detective stated that after reviewing the film with another officer and ascertaining its obscene content, he obtained a warrant for appellee's arrest, which he served. After argument by counsel and receipt of the arresting officer's testimony, the trial judge ruled:

> "The court is of the opinion that the provisions of Article 27, §423 extend an outright exemption in this case, noting in passing that the alleged obscene material was obtained by Corporal Fickinger, a government agent, and the court rules that if the government had a right to possess [obscene material,] someone had a right to deliver the possession [of it], and accordingly will grant the motion to dismiss. This action by the court leaves the State free to proceed with any appellate review that they wish.
>
> The question of the overbreadth or vagueness of the section, §423, relative to the constitutional question will not have to be decided by this court. Although I might observe in passing it would appear to this court to be

> vague and overreaching. However, the decision in this case is predicated upon the fact that the court at this hearing declares that the defendant is exempt in an evaluation of the testimony proffered with respect to the motion to dismiss and, accordingly, will dismiss the information."

Appellant argues that the criminal information was sufficient to charge an offense, and that the trial court improperly granted the motion to dismiss.[3] We agree.

The trial court's error was procedural. Upon review of the record, it is clear that counsel were presenting separate arguments, respecting appellee's motions to suppress and to dismiss. The motion to dismiss was argued first. During the course of argument, which turned on the applicability of the §423 exemptions, appellee's counsel referred to certain signs which allegedly hung in appellee's store as notice that sales would only be made pursuant to those exemptions. It appears that counsel even went so far as to have photographs of such signs marked for identification. Nevertheless, it is clear that they were never introduced into evidence. More importantly, no actual testimony of any kind was ever presented to the trial court relative to the motion to dismiss. Appellee's counsel merely made proffers of what the testimony and evidence would show.

At this point in the proceedings, the focus shifted and appellee's motion to suppress came on for consideration. But again, the record clearly reflects that the arresting officer's testimony, *supra,* taken at that time, applied only to the motion

3. Appellant also argues that the trial court improperly interpreted Art. 27, §423. We do not reach that issue in this case, but confine ourselves solely to the procedural question whether the grant of the motion to dismiss was proper under the circumstances.

to suppress, not to the motion to dismiss. So, at the close of argument on the two motions, the record contained testimony only relative to the issue of suppression, and only proffers of testimony respecting the issue of dismissal. It is therefore evident that when the trial court set aside the issue of suppression to rule on dismissal the record as to dismissal was wholely insufficient to sustain the ruling. The trial court specifically declined to rule upon the constitutionality of the statute; it addressed itself only to the statute's applicability to the *facts in this case.* Herein lies the error. First and foremost, the grant of a motion to dismiss may not properly be grounded in proffered testimony. And second, even if the testimony given as to suppression had properly been presented for consideration on the issue of dismissal, that too would have been insufficient. It wholely failed to establish the facts which appellee originally proffered as the basis for his §423 exemption, *i.e.*, that the notices in question were posted in plain view, that the officer saw them, and that by purchasing the film he agreed to do so for "governmental purposes." Under no circumstances, therefore, was the grant of the motion to dismiss permissible.[4] Consequently, we are compelled to reverse.

JUDGMENT REVERSED.
CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.
APPELLEE TO PAY THE COSTS.

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4. We think we should also make the following point. In this case the criminal information specifically alleged a violation of Art. 27, §418. On its face, the charging document disclosed no irregularity. Therefore, unless the trial court was prepared to rule that the statute was unconstitutional, there was no proper ground for granting a motion to dismiss. Under these circumstances, the question of appellee's guilt, or the applicability of §423, should have been subject to trial where, after proper presentation of testimony, the court could have entertained arguments bearing on the grant or denial of a motion for judgment of acquittal.

APPENDIX B — MARYLAND COURT OF APPEALS' DENIAL OF PETITION FOR A WRIT OF CERTIORARI

In the Court of Appeals of Maryland

Petition Docket No. 190

September Term, 1980

(No. 1193, September Term, 1979 Court of Special Appeals)

CALVIN ANDRE GRAVETT

v.

STATE OF MARYLAND

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: August 11, 1980.

APPENDIX C — PERTINENT CONSTITUTIONAL, STATUTORY PROVISIONS AND MARYLAND RULES INVOLVED

1. First Amendment — United States Constitution

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Fourth Amendment — United States Constitution

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. Fifth Amendment — United States Constitution

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself,

nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

4. Section 1, Fourteenth Amendment — United States Constitution

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No States shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. Article 27, Section 418 of the Maryland Code

"Sending or bringing into State for sale or distribution; publishing, etc., within state.

Every person who *knowingly* sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in the State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor." (Emphasis supplied.)

6. Article 27, Section 423 of the Maryland Code

Appendix C

"The prohibitions and penalties imposed in this subtitle shall not extend to persons having bona fide scientific, educational, governmental, or other similar justification for possessing such matter or to distribute thereof pursuant to such justification." (1967, ch. 394, §1).

7. Maryland Rule 736

"a. A Motion asserting one of the following matters shall be filed in conformity with this Rule. Any such matter not raised in accordance with this Rule is waived, unless the court, for good cause shown, orders otherwise:

1. A defect in the institution of the prosecution;

2. A defect in the charging document, other than its failure to show jurisdiction in the court or to charge an offense which defenses can be noticed by the court at any time;

3. An unlawful search, seizure, interception of wire or oral communication, or pretrial indentification.

4. An unlawfully obtained admission, statement or confession.

5. A motion for joint or separate trial of defendants or offenses.

* * *

Appendix C

c. Other Motions
Any other defense, objection or request capable of determination before trial without trial of the general issue shall be raised by motion filed at any time before trial.

* * *

f. Determination
A motion filed pursuant to this Rule, except a motion to dismiss for failure to obtain a speedy trial, shall be determined before trial unless the court otherwise directs in a motion involving subsection a 4 of this Rule. If factual issues are involved in determining the motion, the court shall state its finding on the record.

APPENDIX D — MOTION TO DISMISS IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY

CA 20366

STATE OF MARYLAND

V.

CALVIN ANDRE GRAVETT

Defendant

MOTION TO DISMISS CRIMINAL INFORMATION

The Defendant, through undersigned counsel move the Court for an order dismissing the case against the Defendant and as grounds for said motion states the following:

1.

The State's Attorney for Prince George's County, pursuant to a Criminal Information has instituted a criminal proceeding charging the Defendant, as follows:

"That the above named Defendant John Doe on or about November 17, 1978 at 2488 Chillum Road, Chillum, Prince George's County, Maryland, unlawfully did distribute obscene matter to wit: a color film 'Plenty to go around', in violation of Ann. Code of Md. Art. 27 Sec. 418."

The Criminal Information is vague and insufficient as a matter of law in that it fails to set forth with sufficient specificity the charges of which the Defendant stands accused.

Appendix D

The statutory provisions under which the State is proceeding are, as written, repugnant to the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States* because:

(a) Said statutory provisions are void for vagueness in that the same forbid or require the doing of an act in terms so vague, fluid and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof, and, as such, are repugnant to the Due Process provisions of the *Fifth* and *Fourteenth Amendment* to the *Constitution of the United States;* and further,

(b) Said statutory provisions ae void for overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the statute sets forth no standards for determining and regulating obscenity and thus are insufficient for those minimum standards proscribed by the United States Supreme Court in connection with publications presumptively protected under the *First Amendment* and *Fourteenth Amendment;* and further,

(c) The said statutory provisions are void for vagueness and impermissible overbreadth, in the area of *First Amendment* freedoms, because the said provisions are susceptible of sweeping and improper application by law enforcement officials and have a "chilling and inhibiting effect" on the exercise of the Federal Constitutional rights of citizens of the State of Maryland and the United States, as well as the Defendants, to publish, distribute, circulate, sell, receive and/or purchase material protected by the *First Amendment,* and further,

(d) Said statutory provisions are repugnant to the substantive Due Process provisions of the *Fifth* and *Fourteenth Amendments* to the *United States Constitution* because they permit deprivation of liberty and/or property rights and interests for the exercise of *First Amendment* rights by unreasonable, arbitrary, and capricious means by law enforcement officials of the State of Maryland without a showing of a real and substantial relationship to any state's relationship to any state's subordinating interest which is compelling to justify state action limiting *First Amendment* freedoms, and further,

(e) Said statutory provisions are impermissibly broad and repugnant to the procedural Due Process requirements of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* by employing means lacking adequate safeguards which Due Process demands to assure non-obscene material the constitutional protection of the *First Amendment* to which it is entitled; and further

(f) That the statutory provisions under which Defendant is being prosecuted on its face deny to Defendant the equal protection of the laws.

3. There was no constitutionally relevant evidence to support probable cause, nor is there any reasonable or probable cause to believe that the material charged under this Criminal Information is obscene under the *First Amendment* and *Fourteenth Amendment* to the *Constitution of the United States* in that:

(a) There was no evidence that the material involved herein exceeds the limits or candor, tolerated in the State

of Maryland, in the representation or depiction of matters pertaining to sex and/or nudity.

(b) There was no evidence that the material involved herein appeals to the prurient interest of the average adult intended recipient, or that the prurient appeal was successful.

The statutory provisions are clearly repugnant to the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States* as said provisions have been applied, construed, and are being applied and construed by the State's Attorney and/or law enforcement officials in the following respects:

(a) That in the application of said statute, the said law enforcement officials did not have available the necessary probable cause or the higher hurdle or unreasonableness necessary for the issuance of the Criminal Information.

(b) That in the application of said statute, the State's Attorney did not limit his prosecutorial efforts, as is constitutionally required, to those instances where sexually explicit materials specifically defined in the State statute, or authoritatively construed, *have been thrust by aggressive sales action upon unwilling recipients, who had in no way indicated any desire to receive or view said materials.*

(c) It is respectfully submitted that this Defendant cannot be subjected to prosecution for the sale or exposure of obscene material unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or

construed, and only under circumstances in which sexually explicit materials *have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials.*

(d) That Defendant herein have by the statute under which they are being prosecuted an affirmative defense to the charges placed against them and are exempt from prosecution herein.

4. That the criminal information and the supporting application for statement of charges does not state a crime under Article 27, Section 418, et seq., and is therefore null and void on its face.

5. That the Defendant was arrested falsely and without probable cause as the charging document does not set forth facts sufficient to establish criminal activity on the part of the Defendant under Article 27, Section 418, et seq.

6. That Article 27, Section 418, et seq. is unconstitutional on its face and as applied to the Defendant in that it denies to the Defendant equal protection under the laws and due process of law in violation of his rights under the *First, Fifth* and *Fourteenth Amendments* to the *United States Constitution.*

7. That Article 27, Section 418, et seq. is void for vagueness and overbreadth.

8. That the State's Attorney has now filed a Motion to Amend the charging document to include the term "knowingly" as a result of acquitals in other cases because the informations in those other cases were as fatally defective as the information in this case. That there is no probable cause now, nor was there

any at the time this information was issued to establish the element of "scienter" under the facts and circumstances of the alleged distribution in this case and to allow an amendment as requested would deny to the Defendant due process of law and this information should be dismissed.

9. That the distribution alleged in the Criminal Information is a *permissive distribution,* and is not considered criminal activity under Article 27, Section 418, et seq.

II.

It is, therefore, respectfully submitted that the prosecution in the case at bar is brought in bad faith for the purposes of harassment and the statute under which the State is proceeding is void for vagueness, unconstitutional on its face and is being unconstitutionally applied to the Defendant.

WHEREFORE, the Defendant prays that the Criminal Information be dismissed.

Respectfully submitted,

/s/
Burton W. Sandler
Suite 600
Towson Towers
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6777
Attorney for Defendant

Appendix D

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 11th day of May, 1979 a copy of the aforegoing Motion to Dismiss Criminal Information was mailed prepaid to John Dominguez, Assistant State's Attorney, State's Attorney's Office, Court House, Upper Marlboro, Maryland, 20870.

/s/
Burton W. Sandler

APPENDIX E — TRANSCRIPT OF PROCEEDINGS AT PETITIONER'S TRIAL IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND, SEPTEMBER 24 AND 25, 1979

[1] VOLUME I

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

Criminal Appeals No. 20,366

STATE OF MARYLAND

vs.

CALVIN ANDRE GRAVETT,

Defendant.

Courtroom No. 1
County Courthouse
Upper Marlboro, Maryland
Monday, September 24, 1979

The above-entitled matter came on for hearing in open court at 10:55 o'clock a.m.

BEFORE:

HONORABLE SAMUEL W. H. MELOY, Associate Judge.

APPEARANCES:

Appendix E

JOHN P. DOMINGUEZ, ESQ., Assistant State's Attorney for Prince George's County, appearing on behalf of the State of Maryland.

BURTON W. SANDLER, ESQ. and LOUIS JAMES MORSE, ESQ., appearing on behalf of the defendant

PAUL GAZDAYKA
OFFICIAL COURT REPORTER
P.O. Box 401
Upper Marlboro, Maryland
20870

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John L. Fickinger	19	25

[2] PROCEEDINGS

THE DEPUTY CLERK: C. A. 20,366, State of Maryland vs. Calvin Andre Gravett.

MR. DOMINGUEZ: John Dominguez, assistant State's Attorney, for the record.

MR. SANDLER: Burton W. Sandler, attorney for the defendant, for the record.

MR. MORSE: Louis James Morse, attorney for the defendant.

MR. DOMINGUEZ: May it please the Court, as a preliminary matter the State wishes to file criminal information in the jacket in this particular case pursuant to a discussion on the 20th of June with your Honor and the defense counsel in this case. And in accordance with that discussion the State is filing this as criminal information in the jacket and serving two copies on opposing counsel.

THE COURT: My understanding with respect to the criminal information, it is against the named defendant, Calvin Andre Gravett, and that the defendant through his counsel, Mr. Sandler, had a prior hearing with respect to C. A. 20366 and consented to the criminal information, which is no more than an amended information, so that it would comply with the provisions of Rule 723. Is that correct, sir?

MR. SANDLER: Yes, sir.

THE COURT: Very well. And you accepted on behalf of [3] your client service of the criminal information just filed?

MR. SANDLER: Yes, sir.

THE COURT: Do you wish to file a plea to it short on the record?

MR. SANDLER: Your Honor, the plea would be not guilty, trial by jury. And the motion to dismiss and the motion to suppress previously filed, your Honor, we would submit, would be applicable to the new information.

THE COURT: And you are requesting the Court to take cognizance of those motions as filed against this criminal information?

MR. SANDLER: Yes, sir.

THE COURT: Very well. Does the State wish to dismiss the original information?

MR. DOMINGUEZ: Well, yes, the State wishes to dismiss the original statement of charges filed in this matter. However, just for the record we would indicate that the probable cause that was present in the original arrest shouldn't have — just strike that, your Honor.

The State does nol-pros the statement of charges. Although the defense attorney's motion to dismiss was captioned "Motion to Dismiss Criminal Information," there were no criminal informations pending at the time the defense attorney filed those motions. It was only a statement of charges.

THE COURT: There should be at issue, as I understand [4] it, the criminal information filed today.

MR. DOMINGUEZ: Yes, your Honor.

MR. SANDLER: Your Honor, we would ask the Court, for the purpose of form, to allow the defendant to amend his motion by interlineation to apply to a criminal information. As I understand, this is a criminal information that has been filed today.

THE COURT: Very well.

MR. SANDLER: In error the original accusation was a statement of charges, I understand. As to form we ask the Court to allow us to amend by interlineation, for the motion to apply to a criminal information rather than a statement of charges.

THE COURT: And in addition thereto you are filing a plea short of not guilty?

MR. SANDLER: Yes, sir.

THE COURT: Very well. Madam Clerk, you will make the following entry on the daily sheet: Criminal information filed; plea of not guilty and demand for jury trial filed by defendant. Motion to suppress evidence filed on the 14th of May, 1979, by interlineation filed against criminal information filed this date. And motion to dismiss heretofore filed May the 14th, 1979, by interlineation, to apply against criminal information filed this date. Answers filed by the State to be considered applicable to motions filed.

Gentlemen, I think that takes care of it. I would [5] be pleased to hear you on your motions.

MR. SANDLER: May I approach the bench, your Honor?

THE COURT: Sure.

(Whereupon, counsel approach the bench and a discussion was had off the record, at the conclusion of which counsel return to the trial table and the following proceedings were had in open court:)

THE COURT: All right, Mr. Sandler, you may proceed, sir. May I have the information? Do you have an extra copy of this, Mr. State's Attorney?

MR. DOMINGUEZ: I filed two copies on the defense.

THE COURT: Take this to the library and get me a couple of photostats, will you.

MR. SANDLER: You could use mine temporarily. We have an extra copy.

THE COURT: All right, sir, proceed.

MR. SANDLER: Your Honor, we have before the Court a motion to dismiss the criminal information and a motion to suppress. The bases, your Honor, for the motion to dismiss and the motion to suppress are the same and overlapping, although I would assume procedurally they must be placed before the Court to make the record complete.

The argument that we proffer to the Court in connection with the motion to dismiss, as I am sure you have seen the motion to dismiss, will address the Court orally as to only one [6] element of that motion to dismiss without waiving any of the other arguments made on the face of the motion as to the constitutionality, so forth and so on.

THE COURT: Let me find the motion now. Very well, I have it.

MR. SANDLER: We have, your Honor, in the motion to dismiss the criminal information, made numerous allegations as to why the Court should dismiss the criminal information. We have alleged numerous constitutional issues. As indicated, your Honor, I will address myself only to one issue orally and without waiving any of the other issues raised on the face of the motion.

Your Honor, basically we proffer to the Court that the defendant before the Court is charged with allegedly selling an obscene motion picture in violation of Article 27, Section 418. We submit, your Honor, as a result of the language in Section

423 of Article 27, "Exemptions," the conduct of the defendant is not criminal conduct and not prohibited under the statute, and for that reason, your Honor, the criminal information should be dismissed.

THE COURT: Just a minute. All right, go ahead.

MR. SANDLER: For the purposes of the argument, your Honor, the language of Section 423, and for the record, states as follows, and with the Court's permission I would like to read it into the record.

[7] THE COURT: You may, sir.

MR. SANDLER: Section 423, your Honor, states,

"The prohibitions and penalties imposed in this subtitle shall not extend to persons having bona fide scientific, educational, governmental, or other similar justification for possessing such matter, or to distributions thereof pursuant to such justification."

Your Honor, we have indicated to you that there is a New York statute, and we have submitted to the Court the case of People vs. Ranch out of the New York court. The New York statute has a similar, almost identical section in it, but on its face it makes it an affirmative defense. It makes an affirmative defense available to an individual that he can raise at trial or prosecution.

THE COURT: I thought they went by the wayside when you speak of the Mullaney case and the others that follow.

MR. SANDLER: No, sir. I submit, Mullaney did not set that aside. By statute the legislature can make it an affirmative

defense, or, if it's not on the face of the statute, by judicial construction an appellate court can construe the statute as to make it an available affirmative defense.

But the analogy, I submit to the Court, in that case was the Court said that if an affirmative defense was not available to an individual by virtue of the exemption language in the statute, then he would be denied due process and equal protection [8] of the law.

So that in order to save the constitutionality of the New York statute that Court decided that the exemption, even though on its face it made it an affirmative defense, would have to be available to the defense, or else they would be denied equal protection of the law.

As I recall, the argument in that case was that it's not an affirmative defense, it shouldn't be an affirmative defense, and the Court reasoned if it wasn't, that in order to save the statute it would have to give the same opportunity to this defendant as to people that fell within this category, or else it would deny equal protection of the law.

THE COURT: Are you saying, Mr. Sandler, that you feel it's necessary to point out a defense to a statute?

MR. SANDLER: To point out a defense?

THE COURT: Yes. That's, in effect, what it's doing.

MR. SANDLER: No, sir. I'm saying that in our particular situation, under the Maryland statute we do not have a defense, we do not have to point out the defense. I am saying under the context of the conduct that's been alleged on the part of the

defense in this case we have an outright exemption. His conduct is not criminal by the very language of the statute. In this case he allegedly sold a motion picture film that was obscene.

In a sense, when you have a case like this before the [9] Court you put the cart before the horse, because no one has yet determined the motion picture film is obscene. There has been no judicial proceeding, no adversary proceeding, and no application of a constitutional standard to determine that it's not protected expression. But for all intents and purposes we have made these arguments like this is bootstrapping, but we come in here being charged with selling an obscene film.

What we are saying, assuming for the sake of argument that the motion picture is obscene as a matter of law, and for the sake of argument the defendant did, in fact, sell it or distribute it, distribute it as required under the law, then, your Honor, it would not be criminal conduct under Section 423, because the object of the individual purchasing the film, we submit to the Court respectfully, we proffer to the Court that we can demonstrate, was for the purpose to be used as evidence in a pending criminal prosecution.

Now, we would suggest, your Honor, that the officer who purchased the motion picture film and, in fact, selected the film without any help from the defendant, did so as an arm of the government, did so for governmental purposes or for other similar justification, and that is the broad language in that section of 423.

If that is what he did, then obviously the distribution was pursuant to that justification. He didn't make any other justification known to the defendant. We are suggesting, [10] your Honor, proffering that the purpose of the distribution was also for educational or other similar justification and that it's not prohibited conduct under this statute.

Now, we submit to the Court if someone would walk in that store and say, "Now, look, I'm not buying this film I'm picking out for educational, scientific, governmental or other similar justification. I'm buying it for some other reason I'm not going to tell you about," and the defendant would then sell it to him or distribute it to him, then that would be criminal conduct.

This language under Section 423 is broad. The other similar justification portion of it covers a vast area of speculation. The legislature made the language available to us. And, your Honor, obviously we should be able to use the vagueness. I would say that under the old contract law all ambiguities in the contract are construed against the draftsman. But we have a penal statute here. I suggest that vague language should be construed in favor of the defendant and he should be able to take advantage of it. We didn't place it there, but it's there. It didn't stop at educational and scientific; it went on further to say or other similar justification.

I respectfully submit to the Court than can be expanded to include the conduct that is alleged on the part of my client here, and I respectfully submit, your Honor, that it is not criminal conduct. Without going into the evidence, [11] unless the Court wants us to demonstrate, we suggest going beyond the motion to dismiss, that the evidence must be suppressed for constitutional reasons and due process reasons under the Fifth, the Fourth and the Fourteenth Amendments. Because if it's not prohibited conduct under Section 423, then it can't be used.

THE COURT: You used the Fifth Amendment. Where do you bring the Fifth in? I understand the Fourth and perhaps the Eighth and Fourteenth.

MR. SANDLER: Equal protection.

THE COURT: The Fifth?

MR. SANDLER: Yes, sir.

THE COURT: All right, go ahead.

MR. SANDLER: That, your Honor, would be basically the argument for both the motion to dismiss and the motion to suppress. We have asked for a suppression hearing. I don't believe it would be necessary, unless the State wants us to demonstrate through the witness the purpose the material was purchased. I would think the Court maybe could take judicial notice of the fact the police officer is an arm of the government.

I don't believe he purchased it for his own personal use or to do anything with it other than to use it in this case. I suggest that is a governmental purpose and covered under the language of this statute or under the broadening language of [12] "other similar justification." And that brings the defendant within the purview of the language and within the purview of noncriminal conduct.

On that basis, if it's noncriminal conduct, statutorily the motion to dismiss should be granted, and evidence for equal protection reasons should not be used in this trial if the Court decides not to grant the motion to dismiss. Thank you, your Honor.

MR. DOMINGUEZ: Your Honor, —

THE COURT: Before you get started I am going to re-read this argument that has been filed, as well as amplified by oral argument.

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(There was a short pause in the proceedings).

THE COURT: Very well, Mr. Dominguez, you may proceed.

MR. DOMINQUEZ: Your Honor, if the defendant argues the Court should dismiss the charges in this case because he has an affirmative defense, I believe, your Honor, that is just not criminal procedure, that is not criminal law. The defendant has the defense of alibi or justification, or something else he can raise at the appropriate point in the trial.

Unlike a Civil case he doesn't have to assert an affirmative defense as an answer to a charge in this case. I have never heard of an affirmative defense being the reason for dismissing a criminal information or charge in the case as equivalent to an action for a summary judgment in a civil case.

[13] Also, the defendant makes another point and says that his conduct under Section 423 is exempted conduct from the obscenity statute. Your Honor, I think defense counsel has adopted or incredibly twisted and made an absurd interpretion concerning Section 423. Section 423 deals with the motives of the defendant. The officer isn't on trial here. A customer isn't on trial. It's the person who is charged with distributing obscene material, and that's the person whose motives are at issue here, not the police officer's.

The statute reads ". . . bona fide scientific, educational, governmental, or other similar justification. . ."

THE COURT: That's 423 you're talking about?

MR. DOMINGUEZ: Yes, your Honor.

THE COURT: Go ahead.

MR. DOMINGUEZ: Now, that statute clearly, and on its face, indicates that there may be some circumtances. For example, someone may offer a college course in erotic films. In that particular circumstance if the professor were showing these films to his class it wouldn't be prohibited conduct under Section 418.

Furthermore, you might be able to envision a psychiatric counselor or marriage counselor who might have some use for these films, for example, I guess, if a husband and wife's sexual relationships just deteriorated and they had no interest at all. Perhaps he may show these films for his scientific [14] purposes or counseling purposes to try to get a spark — to kindle a spark of excitement in the marriage in which the flame had gone out. Section 423 covers those types of conduct.

Just because the defense in this case will argue that there are signs, boilerplate signs posted over this adult book store at which the defendant works, that doesn't make it a bona fide claim that the films are being sold for a bona fide scientific, educational, library purpose. There are such things as shams, and signs can be put up really just as a sham.

In this particular case the detective, Detective Fickinger, of Vice/Intelligence of Prince George's County, went in, made a direct buy at this bookstore of the film from the defendant. He went back to the police station, he viewed the film. He went to the Commissioner, he applied for a statement of charges, the Commissioner authorized the issuance of the arrest warrant and then Officer Fickinger went and arrested the defendant.

Those are the circumstances in this case, and under those circumstances I believe, your Honor, that the defense has not

raised any legal ground that would justify either a suppression of the evidence in this case or a dismissal of the criminal information. Thank you, your Honor.

MR. SANDLER: If your Honor please, if I have created any confusion I apologize to the Court and to the State's Attorney. But I was not under the impression I indicated we [15] were making an affirmative defense in this case, or that we were required to make an affirmative defense, and obviously the State was under the impression that was our position. I used as an analogy a New York statute that makes an affirmative defense available to a defendant that had the identical language to it that our statute has.

THE COURT: I understand it's an addendum to our 423.

MR. SANDLER: It's identical to our 423. The only difference is it states if it's an affirmative defense.

To clarify the situation further, I notice that the State's Attorney conveniently avoided the latter portion of the section that deals with other similar justification or refers only to that language that talks about governmental, educational or scientific. He mentioned the library, but that is not included in our statute.

Section 423 has two parts to it. It deals with possession and distribution pursuant to a certain justification. You know, your Honor, that it's not unlawful to possess obscene material in the privacy of one's own home. The Supreme Court of the United States has decided that.

In our motion to dismiss, your Honor, not having argued it but not having waived any of the statements, you will notice we say the statute is void for vagueness and vague for overbreadth.

He talks about the bona fide language in the section. [16] Well, we have said the statute, if it doesn't prohibit, if it doesn't exempt us because of this type of conduct, is void for vagueness and void for overbreath. The section doesn't define bona fide, and if bona fide is applied to other similar justification how does one treat bona fide as to other similar justification? There is vagueness in that section.

In addition, your Honor, it's void for overbreadth because it is overbroad, and in its overbreadth application it denied equal protection of the law if it's not available to us. If you will recall, your Honor, in the motion to dismiss, Page 4, Section (b), we said:

> "That in the application of said statute, the State's Attorney did not limit his prosecutorial efforts, as is constitutionally required, to those instances where sexually explicit materials specifically defined in the State statute, or authoritatively construed, have been thrust by aggressive sales action upon unwilling recipients, who had in no way indicated any desire to receive or view said materials."

THE COURT: That's some kind of fancy language for a dirty book or film. Go ahead.

MR. SANDLER: The Supreme Court of the United States in Miller v. California, — I have a slip opinion here, your Honor — redefined obscenity or obscene material. And if we go to trial in this case, your Honor, today then obviously the [17] Maryland law as construed would be bound by the new definition of obscenity that arose in the Miller case. Interestingly enough, your Honor, in the slip opinion — and I will submit it

to the Court for the Court to take a look at it; I'm sure the State has read the case — the Supreme Court of the United States stated as follows, with the Court's permission:

> "This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."

Now, they go on further to say as follows, and this is the most important and interesting part of this:

> "It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment."

What I am suggesting to your Honor and what we have [18] suggested in our motion to dismiss — and this, your Honor, falls in line, I believe, with our argument in connection with the exemption under Section 423. We first take the position that we have an outright exemption, not an affirmative defense, by the very language of the statute, the very broad language of the statute under the context of the conduct that has been placed before the Court.

THE COURT: In other words, the sale wasn't solicited or thrust upon him? That's what you are saying?

MR. SANDLER: Yes, sir. We are saying that under the very language of our statute we have an outright exemption.

B, we are going on further to say that because the State of Maryland must now, in trying an obscenity case, apply the Miller standards, that those standards are only applicable to a situation where material is thrust by aggressive sales action upon unwilling recipients.

THE COURT: How can I buy your first argument unless I have heard some testimony relative thereto?

MR. SANDLER: You mean the exemption portion?

THE COURT: Yes.

MR. SANDLER: As I said, your Honor, we would argue and if you wanted to hear evidence on the suppression hearing we would be more than happy to call a witness.

THE COURT: I don't feel I could make an intelligent decision on that point without evidence. I mean, what you are [19] telling me may very well be a perusal of the evidence, but it's not literally before me.

MR. SANDLER: Then, your Honor, going on to the suppression argument and setting aside the motion to dismiss for a moment, we will call for the purposes of the suppression hearing the police officer to the witness stand as our witness.

Officer, would you please take the stand.

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Whereupon,

JOHN L. FICKINGER

was called as a witness by and on behalf of the defendant and, having been first duly sworn, was examined and testified as follow:

DIRECT EXAMINATION

By Mr. Sandler:

Q. Would you state your full name and address for the Court? A. Corporal John L. Fickinger, Prince George's County Police, stationed at the Vice/Criminal Intelligence Section in Forestville, Maryland.

THE COURT: How do you pronounce your name?

THE WITNESS: Fickinger.

THE COURT: They had a F-1 here and I wanted to make sure.

By Mr. Sandler:

Q. Officer, let me direct your attention to November the [20] 17th, 1978, did you have occasion to be at 2488 Chillum Road on that date? A. Yes, I did.

Q. Will you tell me what, if anything, you did? Approximately what time were you at that address? A. About 11:05 in the morning.

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THE COURT: What time?

THE WITNESS: About 11:05 in the morning. At 11:05.

By Mr. Sandler:

Q. What was your purpose in going to that particular location? A. To see if movie films were offered for sale.

Q. Just movie films? A. I'm not sure what you mean.

Q. You say movie films in general? A. I was to see if pornographic movie films were offered for sale.

Q. Why were you looking for pornographic movie films? A. Because they may have been in violation of the law.

Q. Do you know what "pornographic" means? A. I believe it is sexually explicit.

Q. Did you find pornographic films? A. Yes, I did.

Q. Did you select a particular film? A. I selected a film.

[21]Q. A film? A. Yes, sir.

Q. You selected it yourself? A. Yes.

Q. What was the condition of the film when you selected it? Was it in a box? A. Yes, it was in a box.

Q. Were you able to view the film? A. There was advertising on the outside that showed a scene from the film.

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Q. How did you know that it was a scene from the film in the box? A. That's what it said.

Q. You had no way of knowing that? A. If they advertise it to be there I felt that it would be in there.

Q. Now, why did you purchase that particular film? A. You mean versus — why one was selected over others?

Q. That particular film. Why did you select that particular film? A. I'm not particularly — why this one? Probably because there were five participants.

Q. Did you find that amusing? A. No. Amusing, no.

Q. Did you find it interesting? [22] A. It's very hard to say. I wasn't able to see the whole film.

Q. What effect did the five participants have on you to make you select that particular film? A. I don't know. I'm not sure what you mean. I don't know what you mean by an "effect".

Q. What I'm trying to find out is why you picked that particular film. A. Because I was going to pick one.

Q. Any film at random? A. I don't know that it's fair to say "random" because I looked through twenty-five or thirty that were offered for sale and I chose one. It's probably not fair to say "random", because random you close your eyes and choose one.

Q. Why did you choose that one? A. Because I felt if, say, it's pornographic film five participants would be — could

possibly be obscene, where something else might not, I don't know. I chose — that was my basis for choosing it.

Q. You picked out that film and, I take it, you took it up to a counter where somebody was standing behind a cash register, is that correct? A. I went in, Mr. Gravett, the defendant, was behind a counter, I asked him if they had any film. He brought out a stack of approximately twenty-five or thirty films and I chose [23] my film from there, paid him for it.

Q. Did you take the film with you? A. Yes, I did.

Q. Did you view the film later? A. Yes, I did.

Q. By yourself? A. I believe there was one other vice officer with me.

Q. One other vice officer? A. Yes.

Q. Then you made an application or you prepared a statement of charges, is that correct, after you viewed the film? A. I believe that I prepared an application for an arrest warrant.

Q. Eventually, after your viewing the film with another vice officer you obtained a statement of charges? Is that a correct statement? A. I believe it was a statement of charges. I'm not sure what the form was.

Q. Some accusation vehicle by which you could arrest the defendant? A. Yes, that's correct.

Q. Now, whose money did you use to buy that film with? A. It was advanced funds of the Police Department, Vice Criminal Intelligence Section.

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Q. How much money did you have? [24] A. Fifteen dollars and seventy-five cents, what was required to buy this.

Q. How much did you have in advanced funds? A. I always have at least a hundred dollars.

Q. Sir? A. I always have at least a hundred dollars.

Q. As a matter of fact, when you went into the premises on that particular day you viewed this film in a machine and then went and purchased it? Isn't that correct? A. No, that is incorrect.

Q. Did you view any film before you purchased this film? A. No, I did not. You mean the peep shows?

Q. Yes. A. No, I didn't.

Q. How many times have you been in that store before you made this particular puchase? A. I believe — I believe, twice.

Q. Now, getting back again to your purpose in buying the film. Then it wasn't for your own personal use? A. This was not for my own personal use, no.

Q. Would it be fair to say it was for use in your employment as a police officer? A. I believe that would be fair to say.

MR. SANDLER: I have no further questions of this witness.

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[25] CROSS-EXAMINATION

By Mr. Dominguez:

Q. Detective Fickinger, where is the store located that you bought the film? A. At 2488 Chillum Road, Chillum, Prince George's County, Maryland.

Q. Do you know the title of the store, the name of the store? a. Silver News. I believe it's Silver News, Inc.

Q. Was there anyone else in the store besides the defendant working — employed in the store besides the defendant? A. None that I could see.

Q. You have indicated that you went to this store, the Silver News, Inc. store, on November 17th. Was this your own idea or was this a concerted effort by Vice/Intelligence? A. This was a concerted effort by the Vice Squad.

Q. How many other officers made arrests? A. Excuse me?

Q. How many other officers made arrests that day or that week? A. There were seven additional arrests on the 20th of November.

Q. Did you meet with anybody in Vice/Intelligence before you decided to go in the Silver News, Inc. store? Did you meet — A. No.

[26] Q. Did you meet with Vice/Intelligence — did you meet and form a plan of action? A. Yes.

Q. Did you consult with the State's Attorney's office before you went down? A. Yes, sir.

Q. Who did you consult with? A. I believe, Steve Orenstein.

Q. Is it also true that all of the other seven Vice Squad detectives purchased films from other bookstores in Prince George's County using advance funds from Vice/Criminal Intelligence? A. Yes, that is true.

Q. And all that had been planned out beforehand? A. Yes.

MR. DOMINGUEZ: Thank you.

THE COURT: Any further questions?

MR. SANDLER: None, your Honor.

THE COURT: Mr. Fickinger, my understanding is that you addressed the accused, Mr. Gravett, and solicited from him whether or not he had any movie film for sale, is that correct?

THE WITNESS: Yes.

THE COURT: And he, pursuant to your request, exhibited to you a series of films?

THE WITNESS: Yes.

[27] THE COURT: Some twenty or more?

THE WITNESS: Yes, twenty or more.

THE COURT: Where were you physically standing or where was he at that time?

THE WITNESS: There's a high counter, your Honor. He was standing behind the counter, and the counter comes almost to my chin level. The bottom of it is like shelving material and they have —

THE COURT: Did anything transpire between you and the accused during the selection of your — whatever you bought?

THE WITNESS: I don't believe so, other than I may have said, "Do you have any others?"

THE COURT: What was his reply?

THE WITNESS: He produced more. I don't know if there was a reply.

THE COURT: He produced more pursuant to your request?

THE WITNESS: Yes.

THE COURT: Produced more what?

THE WITNESS: More film to select from.

THE COURT: And then you made a selection out of approximately how many?

THE WITNESS: I would say, between twenty-five and thirty.

THE COURT: Very well. Anything else?

MR. SANDLER: No.

[28] THE COURT: Do you have any?

MR. DOMINGUEZ: I have one question, your Honor.

By Mr. Dominguez:

Q. Of these twenty-five and thirty films, what were the titles, do you recall, or the general nature of the advertising on the front of it? For example, did any of them have "Dandy and Donald Duck" on them? A. No, they didn't.

Q. Were any of them "Swedish Erotica"? A. The vast majority were the "Swedish Erotica" brand.

THE COURT: You are not talking about "Dandy and Donald Duck", you are not asking the Court to take judicial notice of "Dandy and Donald Duck", are you?

MR. DOMINGUEZ: Yes, your Honor.

THE COURT: I will take it under advisement.

MR. DOMINGUEZ: No further questions.

(Witness excused)

THE COURT: You may proceed, Mr. Sandler.

MR. SANDLER: Your Honor, I believe it's obvious from the officer's testimony and from the questioning by the State that the funds used to purchase the film selected by the officer came from an arm of the government. I believe it's obvious from

the very inception of the purpose of the selection of the film, and the purchase of the film was for governmental purposes, and that is to be used in the investigation of the alleged [29] criminal activity and in the prosecution of the one charged with violating a particular law.

Either under the governmental purpose of Section 423 or under the other similar justification purpose, your Honor, taking into consideration the fact that the State argues about our boilerplate signs as to the intent of the distribution. Boilerplate or not, the intent of the distributor is made available to the customer. The State decides to refer to it as boilerplate. Well, in our society the way we communicate is either by signs, voice writing, or otherwise, and the intent of the possessor of the material is made available to the public. The silence of the purchaser, your Honor, must be construed in favor of the defendant.

So that if at that point we have a meeting of the minds, we have conduct that comes within the context of the language of Section 423. And unfortunately, your Honor, because of the broad language the statute doesn't place the defendant on proper notice as to what conduct on his part is prohibited so he can prepare a proper defense. Or it's so vague, and if you will recall in our motion to dismiss we requested it to be dismissed because the statute is void for vagueness, that it doesn't put him on proper notice as to what conduct on his part is prohibited.

That is hornbook law, your Honor. That's what a criminal statute must do, or either it's void for vagueness or [30] void for overbreadth. We have an exemption under the circumstances or it denies to us equal protection of the law.

For either reason, your Honor, taking into consideration the striking language in Miller v. California, —

THE COURT: I would like a copy of that, Mr. Sandler. I don't have one.

MR. SANDLER: The State has the official one. I was up there when they decided the case and got a copy of the slip opinion that is underlined, but we have a photocopy of the official one.

THE COURT: I assume the photocopy is just as good.

All right, go ahead.

MR. SANDLER: We would submit, your Honor, that the evidence in this case must be suppressed in light of Section 423. Your Honor, a trial court can't authoritatively construe an appellate statute. A trial court is bound to uphold —

THE COURT: You say a trial court can't construe a statute? I don't agree with that. It may not be final construction, but it can construe it.

MR. SANDLER: What I said was, your Honor, a trial court cannot authoritatively construe a statute, putting something in it that is not there or taking something out of it. The Court is bound to uphold the constitutionality of the statute, if it can, by any construction.

And I say that to you respectfully, your Honor, [31] because there are recent cases that have come out on trial courts, you deal with an ex post facto situation if you try to put something in a statute. Only the legislature can do that or take it out. But you have to save the constitutionality of the statute, if you can.

What I am saying to the Court is you must construe this exemption in favor of the defendant in order to save the statute, or if not it would deny him equal protection of the law. I am suggesting the Court construe the statute by its very language and apply it to the conduct here so that we don't have to be denied equal protection of the law because we don't have an affirmative defense under it. The only thing we have available is the outright broad, vague language of the statute.

In addition I would ask the Court to consider the Miller v. California situation and the new definition that we are bound by and suggesting to the Court that is applicable to the conduct in this case, in considering the motion to dismiss and in considering the motion to suppress, your Honor. Thank you.

THE COURT: You say you don't have an affirmative defense. Of Course, the Court recognizes that the evolution of affirmative defenses appears to be one that requires only the accused to raise the issue, and it is an affirmative defense. If the issue is raised, then it would be, in this instance, upon the State to prove guilty beyond a reasonable doubt and to [32] a moral certainty, and in most instances to negate the issue of affirmative defense.

So I can't say that what you have referred to as the addendum to the New York statute would really have any effect except from an argumentative point of view on this statute. It would appear to me — and I haven't heard too much from the State yet, but maybe the State should cast some light upon what the State considers to be bona fide governmental justification.

Do you care to proceed on this, Mr. Dominguez?

MR. DOMINGUEZ: Yes, your Honor. I have already cited two exceptions or two situations which I felt would fall within

the exemptions contemplated by the statute. There are cases which are cited in the annotations following Section 423 from which I did glean some of these examples. One is Modern Social Education, Inc. v. Preller. That is a United States District Court case here in Maryland.

THE COURT: What is the citation?

MR. DOMINGUEZ: 353 F.Supp 173. That's a 1973 case.

But the problem there, your Honor, in that case was that there was a group, which for all intents and purposes was operating an adult book store, a center for distributing and for selling pornographic material. They had an arrangement where people could come in and they would sign a membership agreement as soon as they came in and they would pay a certain fee and they would get to see a film. It's a peep show, by any [33] stretch of the imagination, and what they tried to do is get around the obscenity laws by claiming that this was a nonprofit organization designed to promulgate certain attitudes toward sexual behavior, and also to promulgate the innovations in sexual behavior by displaying these films.

The Court said in that case that you just have to look to see whether — the Court has to hear the facts of the case and decide whether this is a sham or whether this is a bona fide attempt at promulgating serious social, scientific or educational purposes.

THE COURT: What did they decide?

MR. DOMINGUEZ: I believe, your Honor, they decided — well, the issue was whether or not the police were harassing. They brought a suit for federal injunctive relief, from my understanding of the case.

MR. SANDLER: I believe I can help you on that. I was the attorney who tried it. Your Honor, it wasn't applicable to Article 27. Star v. Preller dealt with Article 66A. What happened in that case, my client had formed what we felt were purely educational, private, nonprofit organizations, and this is an exemption under Article 66A that says you do not have to submit films to the board for approval if they are shown by a nonprofit organization, so forth and so on.

When the clubs were formed we notified the Attorney General what we were going to do and asked for an opinion as to [34] whether or not they would attempt to prosecute people for failing to submit the films to the board. They said they would, and we went into Federal Court and filed suit in 1973 to restrain them.

The case was not decided on the facts the State is suggesting. What happened in that case was the Federal Court decided that they would not issue an injunction and intervene because the issue at that point was, was there a pending State Court proceeding and should the Federal Court interfere. We asked for a declaratory decree in that case in addition to an injunction.

The Federal Court decided against us and commenting on the situation they said you can go to a State Court and if you really prove what you say you will prove you will come within the exemption, but we are not going to enjoin the State from enforcing their laws.

It went to the Fourth Circuit Court of Appeals and they, in part, reversed Judge Harvey and said he should have granted the declaratory decree and not dismiss the case. Subsequently Miller v. California came out and the case went up to the Supreme

Court of the United States and these cases were sent back to the lower courts to try — you know, confining them to the Miller standards, and at that point all parties agreed to dismiss the cases in Federal Court and go ahead.

But it's not applicable here. It did not deal with [35] the criminal statute, Article 27. It dealt with an entirely different situation. Those were bona fide, and that statute didn't define "bona fide". But because of Miller we never went for any clarifying instructions from an appellate court. It's not applicable here. It's not apropos.

I would be happy to submit the brief to the Court. The case went on for a period of several years, because you had many cases coming out of the Supreme Court dealing with the Federal Court's inability to interfere with on-going State proceedings. The issues were entirely unrelated to what is before the Court today. If you were to read the case in its entirety you would find it's not applicable.

The only thing that is strikingly similar here is the Court said if you are what you say you are and if they decide to prosecute you, all you have to do is show the Court you are an educational, nonprofit organization and you don't have to submit the film and you won't be found guilty, but we are not going to enjoin the State from enforcing the law. That is not the issue here and it, in fact, was reversed in part because the Court should have granted the declaratory decree as to the statuts of the parties and that is not an injunction.

MR. DOMINGUEZ: Your Honor, I never intended to tell the Court that that case was dispositive of the issue at bar. You asked me a question, to cite some example, and this case — all it

did was cite an example of a situation that might [36] bring the Modern Social Education, Inc. into the Section 423 exemption. And that's all I intended to cite that case for.

THE COURT: All right, gentlemen. Is there any other argument you wish to proceed with?

MR. DOMINGUEZ: Your Honor, I would like to add also if you read the Miller case you will see that no way does the Supreme Court try to say that the only type of sales action which should be scrutinized by the Court is aggressive sales action upon unwilling recipients.

That's all the Court was doing, was explaining, as the Supreme Court Justices are bound to do in very flavorful language, the type of conduct in the case which they were deciding. That is all.

THE COURT: Very well, gentlemen. It's lunchtime. I will recess until 1:30.

(Whereupon, at 12:00 o'clock noon, the hearing in the above-entitled matter was recessed, to reconvene at 1:30 o'clock p.m., this same day).

[37]AFTERNOON SESSION

(Whereupon, at 1:40 o'clock p.m. the hearing in the above-entitled matter was resumed).

(The Court and counsel retired to chambers and the following proceedings were had in chambers:)

THE COURT: May the record indicate that at the suggestion of counsel an in-camera viewing of the film entitled,

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"Plenty To Go Around" will be viewed by the Court in the presence of the accused and his counsel of record, Messrs. Sandler and Morse, and Mr. Dominguez representing the State.

Counsel have stipulated that the film shown was, in fact, the subject matter of the alleged illegal conduct of the accused and that the presence of the female court clerk is waived.

Is that correct, gentlemen?

MR. SANDLER: Yes, sir.

THE COURT: You may proceed.

(Whereupon, the motion picture film mentioned by the Court was viewed by the Court in chambers and, at 2:40 o'clock p.m., the hearing was recessed, to reconvene at 9:00 o'clock, Tuesday, September 25, 1979).

[38]VOLUME II

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

Criminal Appeals No. 20,366

STATE OF MARYLAND

vs.

CALVIN ANDRE GRAVETT,

Defendant.

Appendix E

Courtroom No. 2
County Courthouse
Upper Marlboro, Maryland
Tuesday, September 25, 1979

The above-entitled matter came on for further hearing in open court at 10:25 o'clock a.m.

BEFORE:

HONORABLE SAMUEL W. H. MELOY, Associate Judge.

APPEARANCES:

JOHN P. DOMINGUEZ, ESQ., Assistant State's Attorney for Prince George's County, appearing on behalf of the State of Maryland. (Excused from appearing at today's proceedings).

BURTON W. SANDLER, ESQ. and LOUIS JAMES MORSE, ESQ., appearing on behalf of the defendant.

PAUL GAZDAYKA
OFFICIAL COURT REPORTER
P.O. Box 401
Upper Marlboro, Maryland
20870

[39] P R O C E E D I N G S

THE DEPUTY CLERK: C. A. 20,366, State of Maryland vs. Calvin Andre Gravett.

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THE COURT: May the record indicate the accused, Mr. Gravett, is present represented by his counsel, Mr. Sandler and Mr. Morse. The State was represented yesterday by Mr. Dominguez. He appeared in my chambers this morning and advised that he was specially scheduled to try another case in another courtroom in this Circuit today and asked to be excused, and indicated to the Court that he had no further argument to present with respect to the hearing on the defendant's motion to dismiss and to suppress and would submit it to the Court for its determination.

Is there any further argument that you wish to present to the Court, Mr. Sandler?

MR. SANDLER: No, sir, there is not.

THE COURT: The Court is of the opinion that the provisions of Article 27, Section 423, extend an outright exemption in this case, noting in passing that the alleged obscene material was obtained by Corporal Fickinger, a government agent, and the Court rules that if the government had a right to possess someone had a right to deliver the possession, and accordingly will grant the motion to dismiss. This action by the Court leaves the State free to proceed with any appeal at review that they wish.

[40] The question of the overbreadth or the vagueness of the section, Section 423, relative to the constitutional question will not have to be decided by this Court. Although I might observe in passing it would appear to this Court to be vague and overreaching. However, the decision in this case is predicated upon the fact that the Court at this hearing declares that the defendant is exempt in an evaluation of the testimony proffered with respect to the motion to dismiss and, accordingly, will dismiss the information.

MR. SANDLER: Thank you, your Honor.

(Whereupon, at 10:27 o'clock a.m., the hearing in the above-entitled matter was concluded).

APPENDIX F — "STATEMENT OF QUESTIONS PRESENTED" EXCERPTED FROM PETITIONER'S BRIEF BEFORE THE MARYLAND COURT OF SPECIAL APPEALS

APPENDIX

THE "STATEMENT OF QUESTION PRESENTED" CONTAINED IN PETITIONER'S BRIEF BEFORE THE MARYLAND COURT OF SPECIAL APPEALS:

QUESTION PRESENTED

Was there legally sufficient evidence to allow the trial court to grant the Appellee's Motion to Dismiss on the basis that under the facts and circumstances in this case Article 27, Section 418, et seq. was being unconstitutionally applied to the Appellee in violation of his rights under the *First, Fourth, Fifth and Fourteenth Amendment* to the *United States Constitution*?

APPENDIX G — PETITION FOR WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

IN THE COURT OF APPEALS OF MARYLAND

Misc. No.

September Term, 1979

CALVIN ANDRE GRAVETT

Petitioner

vs.

STATE OF MARYLAND

Respondent

(September Term, 1979, No. 1193)

Calvin Andre Gravett, Petitioner, by his attorney, Burton W. Sandler, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Court of Special Appeals of Maryland in the case of *State of Maryland v. Calvin Andre Gravett.* (September Term, 1979, No. 1193).

OPINION BELOW

On May 12, 1980, the Court of Special Appeals filed an unreported per curiam opinion reversing the decision of the Circuit Court for Prince George's County, the Honorable Samuel W. H. Meloy, was the presiding Judge at the trial. The Court of Special Appeals held that a trial court cannot properly grant a Motion to Dismiss on proferred testimony and that the

trial court's error was procedural. There are no statutes or authorities cited in the opinion of the Court of Special Appeals to support its findings. (A copy of the per curiam opinion is attached as Exhibit A).

JURISDICTION

The jurisdiction of this Court is invoked under section 12-201 of the Courts and Judicial Proceedings Article and is within the time limits of Rule 812(b) of the Maryland Rules of Procedure.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court may grant a Motion to Dismiss on proferred testimony and testimony, before proceeding to trial in a case, where the Motion to Dismiss alleges in effect, a "defect in the institution of the prosecution" and an unconstitutional application of the statute in violation of constitutional rights guaranteed under the *First, Fourth, Fifth* and *Fourteenth* Amendments?

2. Whether a trial court in its discretion may under Maryland Rule 736(e), formally Rule 725(d), determine the manner in which it will decide to grant or deny a Motion to Dismiss made before trial?

STATEMENT OF THE FACTS

In September, 1979, the Petitioner, Calvin Andre Gravett, was brought to trial in the Circuit Court for Prince George's County upon a criminal information charging him with distributing obscene matter in violation of Maryland Code, Article 27, Section 418. He contended that there was "a defect in

the institution of his prosecution" under the facts and circumstances in this case by virtue of Article 27, Section 423. He further contended that the prosecution was charged with knowledge of Article 27, Section 423 and that under the facts and circumstances in this case the prosecution was instituted without probable cause and he was arrested without probable cause. Petitioner raised the issues prior to a trial on the merits of the case by a Motion to Dismiss and a Motion to Suppress pursuant to the Maryland Rules of Procedure. Petitioner's counsel presented oral argument to the Court and a proffer of testimony in connection with the Motion to Dismiss. Upon request of the Court for testimony as to an "issue of fact", and in view of the fact that testimony would be the same in support of the Motion to Dismiss as well as the Motion to Suppress, testimony was offered only as to the suppression hearing.

The trial court after hearing testimony at the suppression hearing, which supported the proffer of testimony made in connection with the Motion to Dismiss, ruled and decided as follows:

> "The Court is of the opinion that the provisions of Article 27, Section 423, extended an outright exemption in this case, noting in passing that the alleged obscene material was obtained by Corporal Fickinger, a government agent, and the Court rules that if the government has a right to possess some-one had the right to deliver the possession, and accordingly will grant the Motion to dismiss."

The Court further stated:

> "The question of the overbreath or the vagueness of the section, Section 423, relative to the

constitutional question will not have to be decided by this Court. Although I might observe in passing it would appear to this Court to be vague and overreaching. However, the decision of this case is predicated upon the fact that the Court at this hearing declares that the Defendant is exempt in an evaluation of the testimony proffered with respect to the Motion to Dismiss, accordingly, will dismiss the information."

PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS

In addition to the *First, Fourth, Fifth* and *Fourteenth Amendments* to the *United States Constitution,* the following statutory provisions are relevant:

Article 27, §418 of the Annotated Code of Maryland provides:

> "Any person who knowingly sends or causes to be sent, or brings or causes to be brought into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

But §423 (Exemption) states:

> "The prohibitions and penalties imposed in this subtitle shall not extend to persons having bona fide scientific, educational, governmental, or other similar justification for possessing such

matter, or to distributions thereof pursuant to such justification."

Rule 736. Motions Before Trial.

a. Mandatory Motions.

A motion asserting one of the following matters shall be filed in conformity with this Rule. Any such matter not raised in accordance with this Rule is waived, unless the court, for good cause shown, orders otherwise:

1. A defect in the institution of the prosecution;
2. A defect in the charging document, other than its failure to show jurisdiction in the court or to charge an offense which defenses can be noticed by the court at any time;
3. An unlawful search, seizure, interception of wire or oral communication, or pretrial identification;
4. An unlawfully obtained admission, statement or confession;
5. A motion for joint or separate trial of defendants or offenses.

b. Time for Filing Mandatory Motions.

A motion filed pursuant to section a of this Rule shall be filed within 30 days after the earlier of the appearance of the defendant before the court pursuant to Rule 723 (Appearance-Provision for or Waiver of Counsel), except when discovery is furnished on an issue which is the subject of the motion, then the motion may be filed within five days after the discovery is furnished.

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c. Other Motions.

Any other defense, objection or request capable of determination before trial without trial of the general issue shall be raised by motion filed at any time before trial.

d. Content of Motions.

A motion filed pursuant to this Rule shall be in writing unless the court otherwise directs, shall state the grounds upon which it is made, and shall set forth the relief sought. A motion alleging an illegal source of information as the basis for probable cause must be supported by precise and specific factual averments.

e. Determination.

A motion filed pursuant to this Rule, except a motion to dismiss for failure to obtain a speedy trial, shall be determined before trial unless the court otherwise directs in motions involving subsection a 4 of this Rule. If factual issues are involved in determining the motion, the court shall state its findings on the record.

Rule 725.

d. Hearing on Motion.

A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. All issues of fact raised by such motion may be determined by the court without a jury on affidavit or in such other manner as the court may direct.
(Uniform Rule 25 & Rule 725)

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REASONS FOR GRANTING THE WRIT

Review by this Court would be desirable and in the public interest as it is necessary for this Court to resolve the conflict created by the decision of the lower court and the Maryland Rules of Procedure 736, et seq, former Rule 725 et seq, providing for motions before trial and determination of the same prior to trial.

The Court below has ruled that a trial court may not grant a motion to dismiss on proferred testimony. The Court below cites no authority for its position and it would seam that Rule 736 et seq. allows the granting of a motion to dismiss in any manner in which the trial court shall direct or decide.

I.

A TRIAL COURT MAY UNDER RULE 736 (1) AND 736 (f) OF THE MARYLAND RULES OF PROCEDURE GRANT A MOTION TO DISMISS AS A RESULT OF A DEFECT IN THE INSTITUTION OF THE PROSECUTION AFTER CONSIDERATION OF THE FACTUAL ISSUES PRESENTED AND EVALUATION OF THE ENTIRE RECORD BEFORE THE COURT AT THE TIME THE MOTION TO DISMISS IS MADE.

Rule 736 of the Maryland Rules provides as follows:

Rule 736. Motions Before Trial.

a. Mandatory Motions.

A motion asserting one of the following matters shall be filed in conformity with this Rule. Any such matter not raised

in accordance with this Rule is waived, unless the court, for good cause shown, orders otherwise:

1. A defect in the institution of the prosecution;
2. A defect in the charging document, other than its failure to show jurisdiction in the court or to charge an offense which defenses can be noticed by the court at any time;
3. An unlawful search, seixure, interception of wire or oral communication, or pretrial identification;
4. An unlawfully obtained admission, statement or confession;
5. A motion for joint or separate trial of defendants or offenses.

b. Time for Filing Mandatory Motions.

A motion filed pursuant to section a of this Rule shall be filed within 30 days after the earlier of the appearance of the defendant before the court pursuant to Rule 723 (Appearance-Provisions for or Waiver of Counsel), except when discovery is furnished on an issue which is the subject of the motion, then the motion may be filed within five days after the discovery is furnished.

Rule 736(f) provides as follows:

f. Determination.

A motion filed pursuant to this Rule, except a motion to dismiss for failure to obtain a speedy trial, shall be determined before trial unless the court otherwise directs in a motion involving subsection a 4 of this Rule. If factual issues are involved in determining the motion, the court shall state its finding on the record.

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Under prior Rule 725(d), it was provided as follows in connection with a hearing on a motion prior to trial:

d. Hearing on Motion.

A motion before trial raising defenses or objections shall be determined before trial unless the court orders it be deferred for determination at the trial of the general issue. All issues of fact raised by such motion may be determined by the court without a jury *on affidavit or in such other manner as the court may direct.*
(Uniform Rule 25 & Rule 725).

The implication from Rule 725(d) is obviously that a trial court has total discretion as to how it will determine issues of fact raised by a motion. It may do so on affidavits or in such other manner as the court may direct. This implication does not seem to have been disturbed by the new Rule 736(f). There appears no language under Rule 736 that would indicate the trial court does not have the discretion to determine factual issues raised in a motion in any manner it chooses, even on proferred testimony, provided the trial court states its findings on the record.

CONCLUSION

For the reasons herein stated, the Petitioner respectfully requests that this court issue a Writ of Certiorari to review the decision of the Court of Special Appeals to determine the important question as to whether or not a trial court can grant a Motion to Dismiss in the manner in which it was decided in the trial of the case before this court. It is respectfully suggested that the decision of the court below is in conflict with the accepted practice in the Federal Courts and other

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Courts throughout the United States in addition to being in conflict with the Maryland Rules of Procedure.

Respectfully submitted,

s/ B.W.S.
Burton W. Sandler
Suite 600
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6777
Attorney for Petitioner

IN THE COURT OF APPEALS OF MARYLAND

NO:

September Term, 1979

CALVIN ANDRE GRAVETT

Petitioner

v.

STATE OF MARYLAND

Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of June, 1980, a copy of the aforegoing Petition for Writ of Certiorari to the Court of Special Appeals of Maryland was mailed,

postage prepaid, to Stephen Sachs, Attorney General, Office of the Attorney General, One South Calvert Street, 14th Floor, Baltimore, Maryland 21202; and John P. Dominguez, Assistant State's Attorney, State's Attorney's Office, Court House, Upper Marlboro, Maryland 20870.

s/ B.W.S.
Burton W. Sandler